THE PREROGATIVE IN THE SIXTEENTH CENTURY

During the Tudor period the king was the predominant partner in the English constitution; and the view which the law took of his prerogative determined the new theory of the English state which was emerging in the sixteenth century. There was, as we might expect, a great development of legal doctrine as to the position of the king and as to the nature and extent of his prerogative, and a corresponding development in the theory of the state. But, though the law assigned the predominant position in the state to the king, it stopped short of assigning to him the position of absolute ruler; and the position assigned to Parliament at the law caused the English theory of the state to retain many more mediaeval ideas than were retained by those continental states which were attaining national unity through royal absolutism. It was thus difficult to state altogether clearly either the position of the king or the theory of the state which was emerging at the close of the sixteenth century; and it was the obscurity upon these fundamental matters which, the following century, made it possible for the supporters of king and Parliament to take diametrically opposite views upon these questions. It follows, therefore, that it is hardly possible to do justice to the contentions of the parties to that great constitutional controversy unless we take account of the manner in which the law on these matters had been developing during the preceding century. An attempt to sketch this development is made in this paper.

In England, as in France, the idea that the king was superior to any ordinary feudal lord had been, from the thirteenth century onwards, present to the minds of English lawyers. In both countries the progress of this idea had been checked by the recrudescence of feudal turbulence in the fourteenth and fifteenth centuries. But in the sixteenth century, both in England and abroad, it had begun to develop with the development of the independent territorial state, and with the definite subordination of the church to the state. The king of England, like his continental brethren, became the leader, the representative, the embodiment of the state—"the light and life of the commonwealth," [1] in whom "the entire personality of the nation was wrapped up"; [2] and from the reign of Henry VIII he had been the supreme head under God of the church. The state, to which the church was now

[1] Coke, Third Instit. (1649) 18; note that (1554) 1 Mary Sess. 3, c. 1, declared that the attributes of the office of king were the same whether it was vested in a male or a female.

[2] 2 L. and P., Introd. LXV.

subordinate, had necessarily taken upon itself the character of a divine institution; and the king as its head could therefore lay claim to a divine appointment.[3] These developments of the kingly office are found both in England and abroad. But at this point the parallel between the English and the continental development ceases. The English king was the representative of the state, his prerogative was the source of the executive authority in the state, and he had large judicial powers; but he was not the sole source of all authority. The state was conceived, not as centering in him alone, but as consisting of a body politic composed of himself as head, and the three estates of his realm as members.[4]

That English statesmen and publicists and lawyers of the sixteenth century stopped short of conferring upon the king the whole authority of the state was due in the first place to the peculiar development of English institutions, and in the second place to the peculiar position of the English common law. The growth of the powers and privileges of Parliament in the fourteenth and fifteenth centuries had safeguarded and given a very practical meaning to the mediaeval idea of the supremacy of the law.[5] Consequently the prerogative was limited in the first place by the powers and privileges of Parliament when Parliament was sitting, and in the second place, at all times by the fact that its extent was defined by the law.

(1) We have seen that the powers and privileges of Parliament were respected even by Henry VIII. In *Ferrer's Case,* he recognized that his powers when acting with Parliament were far larger than his powers when acting without Parliament.[6] It was quite clear that it was only with its consent that taxes could be imposed and new taxes made. These powers of Parliament were recognized by Sir Thomas Smith and by all other writers on the English constitution of this period.[7] It followed, therefore, that though the king had large powers, he was not all powerful.

(2) The Tudor kings might on occasion pervert the law; but they respected it. For their most arbitrary acts they always endeavored to get a legal sanction. Both the king and his council frequently took

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[3] *Infra,* p. 569.

[4] Coke, Fourth Instit. (1644) 2, "The king and these three estates are the great corporation or body politick of the kingdom."

[5] 2 Holdsworth, *History of English Law* (1909) 368-9; (1912) 12 COLUMBIA LAW REV. 20-21.

[6] 1 Parl. Hist. 555; 1 Hallam, *Constitutional History* (9th ed. 1857) 268-9; and see *Arthur Hall's Case* (1581) 13 Dasent 8-11.

[7] For Smith and his book see *infra,* p. 564; for other writers see I Hallam, *op. cit.* 279-282, and *infra,* pp. 566, 69, 70. In Henry VIII's reign these constitutional doctrines are strongly emphasized in Starkey's account of England in the reign of Henry VIII (E. E. T. S.); he even advocated a council, "not such as he (the Prince) wyls, but such as by the most partie of the parlyament schal be jugyed to be wyse and mate thereunto"; and, though "the grate Parlyament" is to be seldom called, there is to be a permanent council to control the king and "hys propur counsele" when it is not sitting, p. 169.

the opinion of the judges and their law officers.[8] By implication they admitted their acts should be governed according to law. That this was generally understood even by Henry VIII comes out very clearly in the very characteristic tale which was related by Gardiner to the Protector Somerset.[9] Its truth is borne out both by the character of Henry VIII's ecclesiastical settlement,[10] and by the general opinion of his subjects.[11] Bacon, in his argument in *Calvin's Case,* explained that, "Law is the great organ by which the sovereign power doth move"; and that towards the king it had a double office to perform. In the first place it defined his title. In the second place it made "the ordinary power of the king more definite and regular"; for "although the king, in his person, be *solutus legibus,* yet his acts and grants are limited by law, and we argue them every day."[12] The supremacy of the law was a theme on which Coke was never tired of dilating.[13] In fact, it would not be going too far to say that it was the view of all the leading lawyers[14] and statesmen and publicists[15] of the Tudor period.

To give legal expression to the constitutional position of a king who was the head and representative of the state, and yet not possessed of uncontrolled power within it, was by no means an easy task; and the difficulty was increased by the fact that the Tudor lawyers were also obliged to reconcile older legal doctrine as to the position of the king, which came from a time when the state was still to some extent dominated by feudal ideas,[16] with the new position which the king was assuming in the modern state.

As the basis of their exposition (1) they elaborated the few hints

[8] See L. and P., Introd. VI, nos. 1445, 1460 for a difference of opinion between the king and the judges as to the *Nun of Kent's Case.*

[9] 1 S. T. 563-88, cited (1912) 28 Law Quarterly Rev. 244, n. 3.

[10] 1 Holdsworth, *History of English Law* (1903) 359-69.

[11] "It had never been seen," wrote Hussee to Lord Lisle in 1538, "that the king would stop the course of his common law," 1 L. and P. Introd., XIII, no. 1333; Starkey's Book was dedicated to Henry VIII and he could write (p. 181) that the laws, "must rule and governe the state, and not the prynce after his own lyberty and wyle."

[12] 7 Bacon, *Works* (Spedding ed.) 646; and *cf.* "A brief discourse upon the commission of Bridewell", *ibid.* 509-516.

[13] See *e. g. The Case of Proclamations* (1611) 12 Co. Rep. 76, "the kind hath no prerogative, but that which the law of the land allows him"; *cf.* Coke, Second Instit. (1642) 36, 186; Coke, Third Instit. (1644) 84.

[14] (1561) Plowden Rep. 236. "And altho by the Common Law the King has many Prerogations touching his Person, his Goods, his Debts and Duties, and other personal Things, yet the Common Law has so admeasured his Prerogatives, that they shall not take away nor prejudice the Inheritance of any"; *Cavendish's Case* (1587) Anderson Rep. 152-58.

[15] *Supra,* footnote 11; *infra.* pp. 564, 66, 69. Onslow the Speaker in 1566, said, "by our common law, although there be for the Prince provided many Princely Prerogatives and Royalties; yet it is not such as the Prince can take money, or other things or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own. without wrongful oppression, wherein other Princes by their liberty do take as pleaseth them." D'Ewes. *Journal of House of Lords* (1693) 185.

[16] Holdsworth, *History of English Law* (1909) 352 *et seq.*

which they found in their mediaeval books as to the existence of a distinction between the natural and the politic capacity of the king.[17] (2) They supplemented this distinction (a) by laying some stress upon the difference between prerogatives which were inseparable from the person of the king, and prerogatives which were not, and (b) by applying to these prerogatives the distinction, familiar from its application to the jurisdictions of the Chancellor, between absolute and ordinary power.[18]

(1) The distinction between the natural and politic capacity of the king was elaborately stated in the *Case of the Duchy of Lancaster,* decided in 1562.[19] "The King," it was there said,[20] 'has in him two Bodies, viz. a Body natural, and a Body politic. His Body natural (if it be considered in itself) is a Body mortal, subject to all Infirmities that come by Nature or Accident, to the Imbecility of Infancy or old Age, and to the like Defects that happen to the natural Bodies of other People. But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the Management of the public-weal, and this Body is utterly void of Infancy and old Age, and other natural Defects and imbecilities, which the Body natural is subject to, and for this Cause, what the King does in his Body politic cannot be invalidated or frustrated by any Disability in his natural Body." The king therefore, "has a Body natural, adorned and invested with the Estate and Dignity royal . . . So that the Body natural, by the Conjunction of the Body politic to it (which Body politic contains the Office, Government, and Majesty royal) is magnified."[21]

This speculation as to the separation of the natural and politic capacity of the king helped to express his new position as head and representative of the state. It naturally suggested to the lawyers the distinction, with which they were becoming familiar, between corporate and natural personality;[22] and led them to talk of the king as a corporation sole, and to compare him to a bishop, an abbot, a prior, or a parson.[23] As Bacon pointed out, the analogy was not exact, as the king was both natural man and the head of the body politic.[24] In spite

[17] *Ibid.* 358-61.
[18] 2 Holdsworth, *op. cit.* 507.
[19] Plowden Rep. 212.
[20] *Ibid.* 213.
[21] *Ibid. Cf. Willion* v. *Berkeley* (1561) Plowden Rep. 223, 234. A good summary of the law as here stated is given by Bacon in his argument in *Calvin's Case* (1608) 7 *Works* 667, 668.
[22] 3 Holdsworth, *op. cit.* 368-73.
[23] 3 Maitland, *Collected Papers* (1911) 244 *et seq.* At Westminster, for instance, the abbot and prior were separate corporations. See (1538) 28 Hen. VIII c. 49 § 3.
[24] Bacon, *op. cit.* 668. "Let us see what operations the king's natural person hath upon his crown and body politic; of which the chiefest and greatest is, that it causeth the crown to go by descent; which is a thing strange and contrary to the course of all corporations, which ever more take in succession and not by

of this objection it is possible that if the English king had ever become identified with the state something might have been made of the idea that the king was a corporation sole.[25] But in England in the sixteenth century, no statesman or lawyer ever thought of suggesting this identification—he and his subjects together were the "great corporation or body politick of the kingdom."[26] Since, however, the king, as the head and representative of the state, was given a new and peculiar position within the state, it was clear that the old list of semi-feudal privileges, contained in such documents as the Praerogativa Regis,[27] would no longer serve as a complete statement of the law. No doubt this old list of privileges, as interpreted by the Year Books served well enough for the ordinary cases in which the king's prerogatives came before the courts; and a summary of the law grouped round this so called statute was written by Staunforde.[28] But as Staunforde recognized,[29] it did not tell lawyers or politicians anything of the new position in the state which the king and his prerogative was taking. A re-statement of the law on this topic was needed in order to bring it into conformity with the facts and the needs of the day. But to make this new statement something more definite was needed than this somewhat abstract reasoning as to the consequences of the king's double capacity. Some practical deductions must be drawn.

(2) The two chief ideas which lawyers used for the purpose of drawing these deductions were (a) the idea of an inseparable prerogative, and (b) the idea of the distinction between absolute and ordinary power.

(a) To the king in his politic capacity certain powers were said by the lawyers to be inseparably annexed. We can distinguish two different shades of meaning which were attached to this term "inseparable." (1) It was used to mean a right or power which was peculiar to the king, and could not therefore be granted to another person. Thus the right to appoint justices of the peace, to pardon crimes, to create denizens,[30] or to dispense with breaches of statutes

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descent. . . . And therefore here you may see what a weak course that is, to put cases of bishops, parsons, and the like and to apply them to the crown. For the king takes to him and his heirs in the manner of a natural body, and the word *successors* is but superfluous."

[25] 3 Holdsworth, *op. cit.* 362, n. 1.

[26] *Supra*, footnote 4.

[27] 3 Holdsworth, *op. cit.* 352; for this so-called Statute, see 1 Holdsworth, *op. cit.* 261, n. 3.

[28] "*As exposicion of the Kinges prerogative collected out of the great adbridgement of Justice Fitzherbert and other older writers of the lawes of Englande*, by the right woorsshipfull Sir William Staunford knight, lately one of the Justices of the Queenes majesties court of common pleas; whereunto is annexed the Proces to the same Prerogative appertaining, (published 1568)." The dedication to Nicholas Bacon, "the kinges attourney of his court of Wardes and Liveries." is dated Nov. 6, 1548.

[29] 3 Holdsworth, *op. cit.* 352.

[30] (1505) Y. B. 20 Hen. VII Mich. pl. 17, a case turned on a claim of the Abbot of St. Albans to appoint Justices of the Peace. Fineux, *C. J.*, said that this

which might be committed in the future, could belong to the king and to the king only.[31] This idea had appeared at an early date. Bracton had used it to demonstrate the illegality of the possession of jurisdiction by private persons;[32] and the judges of the sixteenth century used it to demonstrate the illegality of various grants of royal rights, and licenses to enjoy the forfeitures arising from the breach of penal statutes or to compound for their breach. The learning upon this meaning of the term "inseparable" was summed up by Coke in the *Case of Penal Statutes,*[33] and the *Case of the King's Prerogative in Saltpetre.*[34] (2) It was used in connection with the dispensing power to express a logical difficulty which the lawyers felt as to the possibility of taking away the prerogative to dispense with a statute, even by Act of Parliament. If, it was said, the king has, by virtue of his office as king a power to dispense with Acts of Parliament, how can this power be restrained? If the Act restrains dispensation with itself, the power to dispense with that restraint still exists *non obstante* the restraint.[35] This prerogative is therefore inseparable. The learning upon this meaning of the term was summed up by Coke in the *Case of Non Obstante.*[36]

"est chose annex al crown et no peut etre sever eu come de grant de pardonner felons ou de faire denizens, est void"; *cf.* (1495) Y. B. Hen. VII Hil. pl. 6, a grant of *omnia jura Regalia* must be interpreted according to the old allowance; 42 Ass. pl. 49, a grant to hold all manner of pleas would not give a right to hold the Assizes.

[31] The *Case of Penal Statutes* (1604) 7 Co. Rep. 36, "When a statute is made *pro bono publico,* and the king . . . is by the whole realm trusted with it; this confidence and trust is so inseparably joined . . . to the royal person of the king . . . that he cannot transfer it to the disposition or power of any private person."

[32] 1 Holdsworth, *op. cit.* 47; Bracton ff. 14a, 55b. The idea also appears in another slightly different form. Some rights might be granted to a private person, but, if granted, they could not exist in the hands of a private person in the same form as that in which they belonged to the king. See (1413) Y. B. 14 Hen. IV Mich. pl. 6 p. 9, "*Le grantee de Roy ne sera la meme condition que le Roy fuit, car le Roy avera la gard de son tenant comment qui il lieu de luy en posteriority. Mes si le Roy grant le Seigneurie a un auter comon person, il ne sera de meme le condition que le Roy fuit.*"

[33] (1604) 7 Co. Rep. 36.

[34] (1607) 12 Co. Rep. 12, "The taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm. And for this cause, as in other purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other."

[35] (1487) Y. B. 2 Hen. VII Mich. pl. 20. From this case Bacon, *Maxims of the Law,* in Bacon, *op cit.* 370, deduces the following proposition: "If there be a statute made 'that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it shall be void; and if there be any *clausala non obstante* contained in such patent to dispense with the present act, that such clause also shall be void'; yet nevertheless a patent of a sheriff's office made by the king for term of life, with a *non obstante,* will be good in law, contrary to such statute which pretendeth to exclude *non obstantes;* and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind." *Cf.* Plowden Rep. 502. The last trace of this idea appears in the phrasing of § 12 of the Bill of Rights. *Cf.* D'Ewes, *op. cit.* 168, the speech of Humphrey Gilbert. The difficulty is somewhat analogous to the difficulty of conceiving an Act by which a sovereign body can effectually limit its own powers.

[36] 12 Co. Rep. 18.

The idea of an inseparable prerogative was therefore a vague idea; but because it was vague it was capable of development. Any part of the prerogative which seemed to be an essential attribute of royal power could be dubbed "inseparable";[37] and the doubt as to the capacity of an Act of Parliament to take it away, which had been applied originally only to the logical difficulty felt in the case of the dispensing power, could be given a wider significance. The manner in which Coke in his usual fashion had generalized from, and embellished his authorities made it possible to cite his authority for such an extension.[38] Therefore in the following century, when the powers of the prerogative and the powers of Parliament were arrayed over against one another, this idea of an inseparable prerogative acquired a political importance, because it could be used to support the proposition that the prerogative as a whole was superior even to an Act of Parliament, and that an Act of Parliament which purported to take it away was a void Act.[39] The idea had not acquired this importance in the sixteenth century. It was used either to express the fact that certain parts of the prerogative were such essential parts of the conception of the prerogative that they could not be vested in any other than the king, or to denote the logical impossibility of taking away his power to dispense with statutes.[40]

(b) The king's prerogative was subject to the law; but there was wide sphere within which the king could act as he pleased. Thus as supreme head of the church he had wide powers over all ecclesiastical matters; as representing the nation in its dealings with foreign nations he was free to act as he pleased; and in times of war and insurrection he must take what measures seemed good to him to restore law and order. Obviously there was a distinction between the doing of such acts as to which he had an unfettered discretion, and the doing of acts, such as the issue of proclamations, the making of grants, or the seizure

[37] Thus in *Bates' Case* (1606) 2 S. T. 371, 383, Clark, B., said: "As it is not a kingdom without subjects and government, so he is not a king without revenues . . . And the revenue of the crown, is the very essential part of the crown, and he who rendeth that from the king pulleth also his crown from his head, for it cannot be separated from the crown."

[38] Thus in the *Case of Non Obstante* 12 Co. Rep. 18, he said: "No Act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante;* as a sovereign power to command any of his subjects to serve him for the public weal; and this solely and inseparably is annexed to his person; and this Royal power cannot be restrained by any Act of Parliament, neither in *thesi* nor in *hypothesi,* but that the king by his royal prerogative may dispense with it."

[39] *The Case of Ship-money* (1637) 3 S. T. 825, 1235, "No act of Parliament can bar a king of his regality," *per* Finch, C. J.; *cf. ibid.* at p. 1085, *per* Crawley, J.

[40] Thus in the *Case of Mines* (1568) 1 Plowden Rep. 310, 335, some. arguing for the crown, "affirmed that this mine, being a mine royal could not be granted or severed from the crown even by express words, for it is an incident inseparable to the crown, as escheats for treasons are"; but this was denied, and nothing was said of this point in the judgment; it would seem that "inseparability" cannot be predicated by the prerogative as a whole, but only of certain parts of it.

of property, for which the law had prescribed conditions. To express this distinction the law borrowed the terms "absolute" and "ordinary," which had already been applied to express the distinction between the cases when the jurisdiction of the Chancellor was bound by the straight rule of the common law, and when it was not.[41] Thus the term "absolute" when applied to the king does not mean that he is freed generally from legal restraint; but merely that as to the particular act to which the adjective is applied he has a free discretion as to the question whether he will do it at all, or, if he wishes to do it, as to how he will do it.[42] But the term "absolute," even more than the term "inseparable," gave countenance to the idea that the king had a large and indefinite reserve of power which he could on occasion use for the benefit of the state;[43] and the constitutional controversies of the seventeenth century gave a very definite meaning to this idea.[44] The older authorities knew of the particular parts of the royal prerogative which were absolute, and the particular parts of the prerogative which were inseparable; but their words were not always very precise;[45] and this want of precision enabled the prerogative lawyers of the seventeenth century to deduce from their statements concerning these

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[41] 2 Holdsworth, *op. cit.* 507.

[42] See the instances given by Mr. Alston in the Introduction to Smith, *De Republica Anglorum* (Alston ed. 1906) XXXI, XXXII. Smith talks of the Prince's absolute power in time of war, his absolute power over the coinage, or over foreign affairs, and of the absolute character of the judgments of Parliament; in all these cases Mr. Alston says the term means "without appeal." I should rather prefer to say that it means an authority the exercise of which cannot be called in question by any legal process, *i.e.*, there exists what we should call an absolute discretion. Thus Lambard, Archeion 136, talks of hearing a case, "by absolute authority without prescribed rule of ordinary proceedings"; Coke, *Caudrey's Case* (1591) 5 Co. Rep. 1, 40b, says that the "kingdom of England is an absolute monarchy," by which he means that it is not subject to the jurisdiction of the pope or other foreign prince. Wray, the Speaker in 1571, said that over Ecclesiastical Causes, "her Majesty's power is absolute," D'Ewes, *op. cit.* 141. Sometimes the word is used in its modern sense, *e. g.*, Sir H. Gilbert makes the statement that, "other kings had absolute power as Denmark and Portugal," D'Ewes, *op. cit.* 168. But this was not said by a lawyer; the legal use is that indicated above. And that this is so can be further illustrated by a passage from Lambard, *Justices of the Peace* (1581) Bk. I c. XI (cited Smith, *op. cit.* XXXII); Lambard there says that he is using "absolute power" in the sense of "discretion," and draws the distinction between a discretion to be exercised "simply," and a discretion to be exercised "after a manner"; this really answers to the modern distinction between a discretion and an absolute discretion.

[43] The adjective "Royal" is sometimes used in a similar way; see the statement in the preamble of (1539) 31 Hen. VIII c. 8 "not consideringe what kinge by his royall power may doe"; 1 Select Cases in the Star Chamber (S. S.) 37, 46 "Riall" is used to signify "absolute" power.

[44] *Bates' Case* (1606) 2 S. T. 389, Fleming, C. B., said: "The absolute power of the king . . . is that which is applied to the general benefit of the people and is *salus populi*. *Cf.* the *Case of Ship-Money* (1637) 3 S. T. 825, 1083. "In the king are two kinds of prerogative *regale et legale*." *per* Crawley, J.

[45] Thus the statement in *Willion* v. *Berkeley* (1561) Plowden Rep. 223, 234, that the king "is the head," and "that he has the sole government" could be easily made the starting point of another theory which regarded the king as corporation sole, and in accordance with the continental ideas, identified king and state.

particular absolute or inseparable prerogatives, the theory that the king had, inseparably attached to his person, a general absolute prerogative to act as he pleased which he could use whenever he saw fit.

No such deductions were drawn by the lawyers and statesmen of the sixteenth century. They recognized that the king had a politic capacity, and that in that capacity he was the head and representative of the state. To that capacity certain powers were inseparably annexed—they were, that is, implicit in the idea of kingship, and therefore inseparable from the person of the king. As to the mode of use of some of these powers the king's discretion was free—he had an absolute prerogative. The mode of the uses of others was prescribed by law. They could therefore be called ordinary because they were subject to the ordinary conditions of compliance with the law. The king himself was not amenable to the law, [46] and the exercise of any of his absolute prerogatives could not be called in question in a law court. But, subject to these qualifications, both the extent of the prerogative and the mode of its uses were subject to certain legal limitations which the law courts must interpret. [47]

The English king therefore was far from being the sovereign power in the state. Nor do I think that any lawyer or statesman of the Tudor period could have given an answer to the question as to the whereabouts of the sovereign power in the English state. The doctrine of sovereignty was a new doctrine in the sixteenth century; nor is it readily grasped that the existence of a conflict between several competitors for political power makes it necessary to decide which of these various competitors can in the last resort enforce its will. [48] There is a negative element about the doctrine of sovereignty as well as a positive. We must be able to assert not only that the sovereign

[46] 2 Holdsworth, *op. cit.*, 198.

[47] Perhaps the best short summary of the actual state of the law in the sixteenth century will be found in Hooker, *Ecclesiastical Polity* (1604) Bk. VIII, c. 2, 17; see *infra*, footnote 64, for edition cited in this article.

[48] Sir Frederick Pollock, *History of the Science of Politics* (ed. 1911) 57 holds that Smith, in his famous passage on the powers of Parliament and elsewhere did intend to assert that the king in Parliament was the sovereign power in the state—"one is tempted to think he must somehow have had knowledge of Bodin's work." Mr. Alston, in Smith, *op. cit.* XXIX-XXXIV, disagrees. He says ,at p. XXXIII: "Smith in declaring Parliament to be the most high and absolute power of the realm (in time of peace) is by no means bringing up for consideration the question of sovereignty in the modern sense, or making statements which have any direct bearing on the great controversy of the next century. Probably he has not seriously thought of the king as likely to come into opposition with the Houses in time of peace, any more than as likely to come into opposition with the rest of the army in time of war. The king is most powerful *when* he is at the head of his army or *when* he is presiding over his Parliament." Mr. Figgis, 3 *Camb. Mod. Hist.* (1905) 748, says of Smith: "The whole standpoint is nearer that of Bracton than that of Bodin." *Cf.* Gooch, *History of English Democratic Ideas in the Seventeenth Century* (1898) 37, 38. Having regard to the manner of the development of English institutions in the sixteenth century, and the legal doctrines underlying them, I am inclined to agree with Mr. Alston rather than with Sir Frederick Pollock. See (1912) 12 COLUMBIA LAW REV. 29, n. 120.

is the person or body to whom the bulk of his subjects are in a state of habitual obedience, but also that he or they are not in a state of habitual obedience to any; and it is not until this conflict has arisen, and has been decided, that men see the necessity for the denial as well as the assertion. For it is not until then that men are driven to consider either the precise extent of the power of the ruler of the state, or the question whether or no it is shared by any other person or body within the state. Till then general assertions as to the supremacy of some particular person or body or persons will serve. It is such a general assertion of the supremacy of the king in Parliament that we get in Sir Thomas Smith's work. No controversy had as yet arisen as to the extent of the powers of the king or the powers of Parliament.[49] He does not contemplate the existence of a controversy between them. All that he means to do is to assert that the king together with his Parliament can exercise supreme authority in the state.

The unique continuity and the peaceful character of the development of English institutions and English law throughout this century had led to the retention of mediaeval ideas as to the relation of the king to the law and government of the state, which were quite opposed to the new theory of sovereignty. It is to Bracton's book, rather than to any more modern authority that lawyers and statesmen of all opinions appeal. Thomas Cromwell,[50] and the upholders of the prerogative in the Elizabethan Parliaments, appealed to Bracton's book to prove that the king was the vicar of God and supreme in his realm;[51] while throughout the century lawyers and the upholders of the rights of Parliament appealed to it to prove that the king's acts were governed by a supreme law.[52] Though English institutions have been adapted to the needs of an independent territorial state of the modern type, the theory of the English state is as yet very mediaeval in its character. Even in the ecclesiastical sphere the Reformation has made, officially, no break with the past.[53]

The manner in which mediaeval institutions had been adapted, with the minimum of change, to suit a modern state is clearly brought

[49] As Mr. Gooch says, *op. cit.*, 38, "the conduct of the Parliaments of the reign [of Elizabeth] exhibits the interesting spectacle of a stout determination to have their way on questions of importance, combined with a tacit understanding that first principles shall be let alone."

[50] 1 L. and P., Introd. XII, no. 1038, Denys, writing to Cromwell, says that Cromwell had caused him and Kingston to read Bracton, in which the king is called Vicarius Christi.

[51] D'Ewes, *op. cit.* 649. In the Parliament of 1601 Cecil said: "If you stand upon law and disputes of the prerogative, heark ye what Bracton saith, *Praerogativam nostram nemo audeat disputare.*"

[52] See *e. g.*, D'Ewes, *op. cit.* 238, Wentworth cited Bracton to prove that the king, "ought not to be under man, but under God and under the law, because the law maketh him a king . . . he is not a king in whom will and not the law doth rule, and therefore he ought to be under the law." *Cf.* Bacon's argument in *Calvin's Case* (1608) 7 *Works*, 646, where a very similar use is made of Bracton's authority.

[53] 1 Holdsworth, *op. cit.*, 366-69.

out in Sir Thomas Smith's famous book on the *Republic of England;* and the manner in which mediaeval ideas had been similarly adapted is equally clearly brought out in Hooker's great work on *Ecclesiastical Polity.* It is from these books that the theory of the English state at the close of the sixteenth century can be most clearly seen.

Sir Thomas Smith[54] (1513-1577) was by no means the least distinguished of the many-sided men who helped to govern England in the reign of Elizabeth. In Henry VIII's reign he had made his name as a classical scholar at Cambridge. In 1540 he was created the first Regius professor of civil law in that University. He went abroad to study his subject and became a doctor in law of the University of Padua. A staunch supporter of the Reformation, he entered the service of the state in the reign of Edward VI. "He became clerk of the privy council, steward of the stannary courts, a master of the court of Requests, provost of Eton, Dean of Carlisle, and in 1548 one of the two secretaries of state."[55] He was attached to the Protector Somerset, and lost his professorship and secretaryship at his fall. In Mary's reign he lost the provostship of Eton and the Deanery of Carlisle; but he received a pension in lieu of these offices, and the friendship of Gardiner protected him from further molestation during her reign. He became prominent once more in Elizabeth's reign. He was on the commission which sat to consider the business to be brought before the Parliament of 1559, and he represented Liverpool in that Parliament. From 1562-66 he was ambassador in France. He became privy councillor in 1571, and secretary of state in 1572. In the latter year he again sat in Parliament, and became chancellor of the order of the Garter. He died in 1577.

Smith was not only an eminent public servant, he was also a classical scholar, a physician, a mathematician, an astronomer, an architect, an historian, and an orator. But it is none of these accomplishments that gives him a place in English legal and constitutional history—it is his little book on the *Republic of England,* written, like Fortescue's *De Laudibus,*[56] when he was in France. The book was first published in 1583. It ran through eleven editions in a little over a century. It was translated into Latin, and in its Latin dress four editions were published.[57] To the editions of 1583 and 1584 the editor and publisher has appended notes. In the former edition the notes are mainly legal: in the latter they are mainly etymological.[58]

Smith set himself to "declare summarily as it were in a chart or

[54] These facts have been taken from Maitland's *Preface* to Smith, *op. cit.,* and from the *Dict. Nat. Biog.*

[55] Maitland's *Preface* to Smith, *op. cit.,* IX.

[56] 2 Holdsworth, *op. cit.* 479, 480-81.

[57] Smith, *op. cit.* Appendix A, 144-47.

[58] Smith, *op. cit.* Alston Introd. XLV-LIII, and Maitland App. A, 147-67 give a very full and clear account of these notes and their relation to the original text.

mappe . . . the forme and manner of the government of Englande and the policie thereof, and sette before your eies the principall pointes wherein it doth differ from the policie or government at this time used in Fraunce, Italie, Spaine, Germanie and all other countries, which doe followe the civill lawe of the Romanes." He has given us, as he says, a true account of an actually existing commonwealth; and he points out that a comparison between this commonwealth of England and the commonwealths of neighboring states would "be no illiberal occupation for him that is a philosopher," nor, "unprofitable for him who hath to doe, and hath good will to serve the Prince and the commonwealth."[59] The book, therefore, as Mr. Alston says, is "a pioneer treatise in Comparative Politics."[60] And it is probable that Smith has emphasized in his sketch the points of contrast with foreign governments. The Privy Council—the real governing body of the country—is hardly mentioned.[61] But foreign states were well acquainted with similar bodies. One great contrast between the English state and the continental was the fact that England was still governed by many courts of mediaeval origin, and by a common law which was wholly peculiar to itself. Thus, as Mr. Alston points out, "to Smith the constitution of a commonwealth consists primarily of its courts and its various forms of law—martial, ecclesiastical and general"; and the "regularly recurring contrast" is between England and countries governed by the civil law.[61a] But another equally great contrast between the English and the continental state was to be found in the unique sphere occupied by the English Parliament. Its existence and activities presented quite as great a contrast to the institution of foreign countries as the English courts and the English common law. I think that it was mainly for this reason that Smith so fully describes it. It was no doubt a court; and it possessed some of the attributes of a court. But it was unique, and not because Smith thought of it primarily as a court does he give it so important a place in his book.[61b]

Though the comparative point of view which Smith adopts led him to emphasize certain of the institutions of the English state, and to neglect others, we cannot accuse him of over-emphasis. The fact that the greater part of the institutions of the English government could be best described under the rubric 'Justice and Police' is obvious from the literature of the subject. Both Lambard and Crompton, who wrote on local government, described the central government in a treatise upon

[59] Smith, *op. cit.* Bk. III, c. 9 Epilogue.
[60] Smith, *op. cit.* Introd. XXVI.
[61] Smith, *op. cit.* Introd. XXVI, XXVII, Similarly "the relation of church and state were too prominent a question in Smith's time, and convocation was still a body of too great constitutional importance, for them to be ignored . . . in an Elizabethan treatise on the constitution. Yet they are passed over without a mention."
[61a] *Ibid.* XXVII.
[61b] (1912) 12 COLUMBIA LAW REV. 24, n. 103.

the jurisdiction of courts. Lambard's tract is political rather than legal in its tone. Crompton's treatise,[62] on the other hand, is legal rather than political—it owes much, as the author says, to the abridgments of Fitzherbert and Brook.[63] It is to a large extent a digest of the Year Books and other cases applicable to the subject. I cannot but think that this characteristic of the literature of the subject is the most striking testimony to that continuity of development, which is the dominant and peculiar note of the history of English public law throughout this century of change.

Hooker's great work is the complement of Smith's. Smith describes institutions. Hooker attempts to extricate the political theory which underlay them. The *Ecclesiastical Polity,* as its title implies, professes to be only a defence of Elizabeth's ecclesiastical settlement. But it is far more than this. It is in fact an explanation and a vindication of the Tudor polity in state and church. Because it is the only book which not only describes that polity but also explains its underlying principles, it is of immense historical interest; and because the results of the constitutional controversies of the seventeenth century were to give practical effect to the theory of the state outlined in it, it is of equal constitutional importance.[64]

Hooker's book is dominated by the mediaeval idea of the supremacy of the law. Heaven and earth alike are governed by laws of different kinds—"the Law which God himself hath eternally set down to follow in his own works; the Law which he hath made for his creatures to keep, the Law of natural and necessary agents; the Law which angels in heaven obey; the Law whereunto by the light of reason men find themselves bound in that they are men; the Law which they make by composition for multitudes and politic societies of men to be guided by; the Law which belongeth unto each nation; the Law that concerneth the fellowship of all; and lastly the Law which God himself hath supernaturally revealed."[65] "Wherefore," he concludes, "of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power."[66] All creation therefore, animate and inanimate, is governed by law. All men are

[62] *L'authoritie et jurisdiction des courts de la Majestie de la roygne* (1594).

[63] See the dedication to *Mes Companions del Middle Temple.* If it be true that the *Diversite des courts,* 2 Holdsworth, *op. cit.* 443, was written by Fitzherbert, we could say that all the chief writers on local government wrote also on other aspects of government through the medium of books on the jurisdiction of courts; but there seems no sufficient ground for attributing this tract to Fitzherbert.

[64] The references have been taken from Hooker, *Works* (3rd ed. by Keble, 1841).

[65] *Ibid.* Bk. I, c. 16.1.

[66] *Ibid.* Bk. I, c. 16.8.

governed by the overriding law of God and of reason; and, besides they are governed by other laws of human origin.

In the first place men must obey the law of the particular society to which they belong—if this were not so, "we take away all possibility of sociable life in the world."[67] The contents of this law must differ according to the needs of particular societies, and vary therefore with time and place.[68] They will necessarily include rules both as to temporal and ecclesiastical matters; and all these rules must be obeyed, provided that they do not contravene the law of God or of nature.[69] Subject therefore to this condition, each particular state is free to adopt the mode of government both in church and state which it pleases.[70] Nor is this unreasonable, because the law really rests upon consent express or implied.[71] It is the act of the whole body politic; and this body politic includes both church and state.[72] Thus in England laws are made by the whole Parliament.[73] The king indeed has dominion over the whole state; "but with dependence upon that whole entire body, over the several parts whereof he hath dominion; so that it standeth for an axiom in this case, The king is *'major singulis, universis minor.'*"[74] Though personally above the law of the state, he is personally subject to

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[67] *Ibid.* Bk. I, c. 16.5. " . . . the public power of all societies is above every soul contained in the same societies. And the principal use of that power is to give laws unto all that are under it; which laws in such case we must obey, unless there be reason shewed which may necessarily enforce that the Law of Reason or of God doth enjoin the contrary. Because except our own private and but probable resolutions be by the law of public determinations overruled, we take away all possibility of sociable life in the world."

[68] *Ibid.* Bk. I, c. 10.9. "To this appertain those known laws of making laws; as the law-makers must have an eye to a place where, and to the men amongst whom; that one kind of laws cannot serve for all kind of regiment; . . . "

[69] *Ibid.* Bk. III, c. 10.7. "To make new articles of faith and doctrine no man thinketh it lawful; new laws of government what commonwealth or church is there which maketh not either at one time or another?"

[70] *Ibid.* see Bk. III, c. 9.2, 3; Bk. VIII, c. 6.6.

[71] *Ibid.* Bk. I, c. 10.8. "Laws they are not therefore which public approbation hath not made so."

[72] *Ibid.* Bk. VIII, c. 1.7. " . . . With us one society is both the church and commonwealth." *Cf.* Bk. VIII, c. 3.6.

[73] *Ibid.* Bk. VIII, c. 6.11. "The parliament of England together with the convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom doth depend; it is even the body of the whole realm"; and, these laws, "are not by any of us so taken or interpreted, as if they did receive their force from power which the prince doth communicate unto the parliament, . . . but from power which the whole body of this realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them . . . So that our laws made concerning religion, do take originally their essence from the power of the whole realm and church of England . . . ."

[74] *Ibid.* Bk. VIII, c. 2.7, this really expresses in the language of the political philosopher what Fineux, C. J., in (1523) Y. B. 14 Hen. VIII Mich. pl. 2, p. 3, tried to express in the technical language of the lawyer: *"Un corporacion est un aggregacion del teste et corps, et nemy un teste solement, et nemy un corps solement . . . Auzi est corporacion per le common ley, come le parliament del roi, et seigneurs, et les commons sont un corporacion; encore le roi poit faire chose sans le parlement come graunt annuitie, etc. Mes nul suera le roi, mes suera a luy per peticion, et auera aide en lieu del voucher."*

Divine law,[75] and his acts are subject to the law of the state.[76] So that, . . . "though no manner of person or cause be unsubject to the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule."[77] "What power the king hath he hath it by law, the bounds and limits of it are known; . . . The whole body politic maketh laws, which laws give power unto the king, . . ."[78]

In the second place these independent societies are bound together by the rules of international law. "The strength and virtue of that law is such that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man, by his private resolutions the law of the whole commonwealth or state wherein he liveth."[79] Europe therefore is no longer one body—one Holy Roman Empire. It is composed of a number of independent states each of which is governed internally by its own municipal laws, and externally by international law; and over all is the law of God and nature.[80] It is law, therefore, which governs the universe; and those states in which the law is supreme are the best ruled, and most in accord with the Divine government of the universe.[81]

Hooker's book is the best proof that the Tudor sovereigns had succeeded in their efforts to adapt mediaeval institutions and ideas to the needs of the modern state. It is because this adaptation had been gradually and peacefully effected that England in the sixteenth century produced no book of European importance upon the theory of the modern state. Grievances, political or religious, acutely felt, are the force which inspire men to raise fundamental questions, and to write books which become landmarks in the science of politics. If it is true that a country is happy which has no history, it is equally true that it is happy in its form of government if its subjects are not moved to probe deeply into the theories which underlie that form of government. Mr. Gooch has said of Fortescue's books that, "there is not much political philosophy to be found in them"; and that "the constant tendency of his work is to slide from general discussions into criticism of the constitution or devising means for its amendment."[82] This is equally true of the political philosophy of Elizabeth's reign. The existing constitution is taken for granted. There is no need therefore to discuss the fundamental principles underlying the modern state except in the most

[75] Hooker, *op. cit.* Bk. VIII, c. 9. 2, 3.
[76] *Ibid.* Bk. VIII, c. 2.17.
[77] *Ibid.* Bk. VIII, c. 2.13.
[78] *Ibid.* Bk. VIII, c. 8.9.
[79] *Ibid.* Bk. I, c. 10.12, 13.
[80] *Cf.* Sir Thomas More's view, expressed in a letter to Cromwell, L. and P., Introd. VII no. 289, p. 124, that all Christendom is one "Corps."
[81] Hooker, *op. cit.* Bk. VIII, c. 2. 12, "Happier that people whose law is their king in the greatest things, than that whose king is himself their law. Where the king doth guide the state, and the law the king, that commonwealth is like an harp or melodious instrument, the strings whereof are tuned and handled all by one, following as laws the rules and cannons of musical science."
[82] Gooch, *op. cit.* 32, 33.

perfunctory way. Practical reforms of actual institutions are much more important. It is mainly for this reason that continental speculation on the theory of the state had little practical influence upon England in the sixteenth century. But the minds of those who interested themselves in public affairs could not be wholly uninfluenced by it. It formed, so to speak, an intellectual background to the stage on which they played their parts, whether their political leanings led them to favour an increase in royal power or to advocate its limitation; and it will clearly become important if a serious constitutional controversy arises within the state. We must therefore take some account of its existence and its as yet indirect influence upon English political theory. In the first place I shall glance at the influence of the royalist theories of the state, and in the second place at the influence of the theories of those who sought to place some limitation upon royal power.

(1) Seeing that the Reformation settlement was founded upon the royal supremacy, we necessarily find a strong leaning in favor of the Divine Right of the king.[83] The Reformation, by emancipating the country from papal control, transferred to its ruler that Divine Right which was formerly the peculiar property of the pope; and this necessarily led to assertions of the duty of blind obedience to the king, and of non-resistance to his will.[84] The Tudors were not indeed in a position to assert the divinity of hereditary right. This useful addition to the theory of the Divine Right of the king was not possible till the accession of James I.[85] But even in the Tudor period the theory of Divine Right strengthened the position of the king by giving a theological color to the somewhat mystical legal doctrines concerning him and his prerogative; and both the legal and the theological doctrines were in harmony with the actual position of the king in the state. It is clear that they will be of infinite value to those who desire to magnify the royal power at the expense of all other powers in the state; and that, when Bodin's doctrine of sovereignty has been assimilated,[86] they will be able to be used to support a theory of royal absolutism.

(2) The Marian persecution had produced books which advocated

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[83] 1 L. and P., Introd. XIV no. 402, gives an official account of the Reformation compiled in 1539; at p. 154 it is said: "the clergy and realm have affirmed that the king is on earth immediately under Christ, supreme head of the church of England, and that the authority thereof is due to his crown, and likewise to all imperial princes in Christendom upon their churches if they will so accept it." *Cf.* Bekinsau, *De supremo et absoluto regni imperio* (Berthelet, 1546) pp. 3, 3b, 19, *"nihil in ullius regni ecclesia novum, absque principis auctoritate, legis instar sanciri potest"*; the book was dedicated to Henry VIII. *Cf.* L. and P., VII no. 1384, for a note of another similar tract of the year 1534.

[84] Figgis, *Divine Right of Kings* (2nd ed. 1911) 93-100, 104, gives some account of this literature.

[85] *Ibid.* 100, 101.

[86] It may be noted that Crawley, J., in the *Case of Ship-money* (1637) 3 S. T. 825, 1083, 1084, cites Bodin to prove that, in cases of imminent danger, "the king ought not to expect a Parliament, but is to raise monies suddenly, and such impositions laid upon the subjects are just and necessary."

resistance to the unlawful commands of rulers, similar in kind to the books produced in France during the wars of religion.[87] Similar ideas were preached by the Scotch reformers;[88] the United Provinces, definitely our allies during the latter part of Elizabeth's reign, were an object lesson of the advantages which might accrue from a successful resistance to tyranny;[89] and there was the large French literature, both Huguenot and Jesuit, which taught similar doctrines. But these ideas had little influence upon Elizabethan England. The nation as a whole was content; and small grievance could be ventilated in Parliament. It was in the seventeenth century, when the supporters of the king had begun to formulate their absolutist claims, that we begin to hear of these ideas. The French literature of the wars of religion then began to influence English politics.[90] Having served its purpose in France it was destined to have a larger practical influence in England than it had in its own country; and eventually, through the English political literature which it inspired, a yet greater influence upon the politics of Europe.

For the present the majority of the nation was satisfied with the balanced Tudor polity, which left large and undefined powers to King and Council, to Parliament, and to the law. King, Council and Parliament retained many mediaeval characteristics, but their form and their authority was being adapted to the needs of the modern state. This was equally true of English law. At the end of the century the mediaeval common law was still the basis of the English legal system. But it had been partially adapted to the new political conditions; and, in addition, other supplementary bodies of law were growing up by its side, and were in some cases threatening to overshadow it. In this way new ideas, some of which are derived from Roman law, civil or canon, had been received into the English system. There had been a Reception of new legal ideas during this century in England as well as in continental states. But, as I have elsewhere shown,[91] this Reception of new ideas differed from the continental Reception of Roman law as fundamentally as the institutions of English state and the theories underlying

[87] Poynet (Bishop of Winchester), *Treatise on Politic Power* (1656), the work of Goodman, once Lady Margaret Professor of Divinity, and the companion of Knox at Frankfort and Geneva. As Mr. Gooch says, *op. cit.*, 37: "Both works were inspired by the fact that Mary's religion was not theirs"; but that, "the principles introduced to defend the national religion are utilised to ensure the preservation of every department of national well-being."

[88] See Gooch, *op. cit.* 44-48 for the works of Knox and Buchanan.

[89] *Ibid.* 52-54.

[90] Gooch, *op. cit.* 28, 29, "the political ideas to which the religious wars in France had given rise continued to circulate in England long after they were forgotten on the continent. The writings of the Huguenots were studied and quoted by the forerunners of the great democratic thinkers of the middle of the seventeenth century . . . The pages of the Ultramontanes, again, were continually searched by Protestant controversialists, and by those eager to discredit the position of their Puritan opponents, by exhibiting their similarity to those that had been maintained by the hated Jesuits."

[91] (1912) 28 Law Quarterly Rev. 246-50.

it, differed from contemporary continental institutions and theories. These peculiarities of the English Reception are the legal counterpart of the peculiar character which the changes wrought by the Reformation and the Renaissance assumed in this country; and they are partly the effect and partly the cause of the peculiarities of the English conception of the king's prerogative and the English theory of the state which I have just described.

W. S. HOLDSWORTH

ST. JOHN'S COLLEGE,
OXFORD